Supreme Court, U.S.
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No _____

In The
Supreme Court of the United States

BRENT E. WOOD,
Petitioner,
v
UNITED STATES OF AMERICA,
Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court of Appeals can waive the jurisdictional requirements of Rules 3 and 4 of the Rules of Appellate Procedure to allow the Government to prosecute the appeal of an order not designated in its notice of appeal?

Whether the Double Jeopardy Clause is violated when a defendant acquitted by the trial court based upon a finding of insufficiency of evidence is subjected to a postacquittal second trial?

Whether the Court of Appeals should remand an appeal to the District Court when there is an unclear basis for the District Court's order granting a new trial?

PARTIES TO THE PROCEEDING

Petitioner

Brent E. Wood

Respondent

United States of America

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RULES

Rule 3 of the Federal Rules of Appellate Procedure 11

Rule 4 of the Federal Rules of Appellate Procedure 11

Petitioner Brent E Wood ("Wood") respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit")

OPINIONS AND ORDERS BELOW

The Unpublished Per Curiam Opinion of the United States Court of Appeals for the Fourth Circuit Reversing the Decision of the United States District Court for the Eastern District of North Carolina, *U S v. Wood*, No 07-4814 (August 14, 2009), which is contained in the Appendix at A-2

The Judgment of the United States Court of Appeals for the Fourth Circuit Reversing the Decision of the United States District Court for the Eastern District of North Carolina, *U S. v. Wood*, No 07-4814 (August 14, 2009), which is contained in the Appendix at A-8.

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JURISDICTION

This Court has jurisdiction to review the judgment of the Fourth Circuit on a writ of certiorari pursuant to 28 U S C. § 1254(1) The judgment of the Fourth Circuit as to Wood was entered on August 14, 2009 Wood's timely Petition for Rehearing *En Banc* and Petition for Panel Rehearing was denied on September 28, 2009. This petition for writ of certiorari is timely filed within 90 days from that date Sup. Ct R 13.3

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S Constitution provides, in pertinent part "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor be deprived of life, liberty, or property, without due process of law

RULES PROVISIONS INVOVLED

Rule 3(c)(1) of the Federal Rules of Appellate Procedure provides, in pertinent part "The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice

(B) designate the judgment, order, or part thereof being appealed, and

(C) name the court to which the appeal is taken "

Rule 4(b)(1)(B) of the Federal Rules of Appellate Procedure provides, in pertinent part: "When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

> (i) the entry of the judgment or order being appealed; or
>
> (ii) the filing of a notice of appeal by any defendant."

STATEMENT OF THE CASE

On August 17, 2009, the Fourth Circuit entered judgment against Wood ("Decision") (Appendix at A-2 to A-7) which decided important federal questions in a way that conflicts with the following relevant decisions of this Court *Becker v Montgomery*, 532 U S. 757, 121 S Ct 1801, 149 L Ed.2d 983 (2001), *Torres v Oakland Scavenger Co*, 487 U S 312, 108 S Ct 2405, 101 L.Ed.2d 285 (1988), *Smith v. Barry*, 502 U S 244, 112 S Ct. 678, 116 L Ed.2d 678 (1992), *Green v United States*, 355 U S 184, 78 S Ct 221, 2 L.Ed 2d 199 (1957), *U.S v Wilson*, 420 U S 332, 95 S Ct 1013, 43 L Ed.2d 232 (1975), *U S v. Martin Linen Supply Company*, 430 U S. 564, 97 S.Ct 1349, 51 L Ed 2d 642 (1977), *Burks v U S*, 437 U S 1, 98 S Ct. 2141, 57 L.Ed.2d 1 (1978), *Hudson v Louisiana*, 450 U S 40, 101 S Ct 970, 67 L.Ed 2d 30 (1981); *Tibbs v. Florida*, 457 U S. 31, 102 S Ct 2211, 72 L Ed.2d 652 (1982), *Smalis v Pennsylvania*, 476 U.S 140, 106 S Ct 1745, 90 L.Ed 2d 116 (1986), *Arizona v Rumsey*, 467 U.S 203, 104 S.Ct 2305, 81 L Ed 2d 164 (1984); *Smith v Massachusetts*, 543 U S 462, 125 S Ct 1129, 160 L Ed 2d 914 (2005), *Sprint/United Management Co v Mendelsohn*, 552 U S __, No 06-1221 (2008), *Capital Cities Media, Inc v Toole*, 466 U.S 378, 104 S Ct. 2144, 80 L Ed 2d 378 (1984), and *Philadelphia Newspapers, Inc v. Jerome*, 434

U S 241, 98 S.Ct 546, 54 L Ed.2d 506 (1978). Alternatively, Petitioner contends that the Decision so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power

I. Procedural History and Facts

On May 17, 2005, Wood and others were indicted by superseding indictment on nine counts, including conspiracy to commit mail fraud and wire fraud, six counts of mail fraud, and conspiracy to commit money laundering The underlying charges related to Wood's involvement in an allegedly illegal investment fund, as one of five members of the management committee of Mayflower Venture Capital Fund III, LLC ("Fund III") Wood pled not guilty and has continuously maintained his innocence throughout these proceedings

Wood's trial began May 1st and concluded on May 11th, 2006, at which time the jury found Wood guilty of all counts except wire fraud Thereafter, Wood timely filed a motion seeking acquittal pursuant to Rule 29 of the Rules of Criminal Procedure as well as a separate motion for new trial pursuant to Rule 33 of the Rules of Criminal Procedure (collectively, the "Motions"). With the Motions, Wood, *inter alia*,

challenged the sufficiency of the evidence presented by the United States Government ("Government") at trial

On July 18, 2007, District Court Judge Terrence Boyle ("Judge Boyle"). who presided over the trial, agreed that the Government's evidence was insufficient to warrant the jury's verdict, granted, *inter alia*, Wood's motion for new trial, and entered an order ("July 18th Order") which said

> a "In this case, a rational trier of fact could not review the evidence and conclude that Wood . . acted with a specific intent to defraud investors or to launder money,"
>
> b "[N]o evidence was adduced at trial from which a jury could reasonably conclude that Wood . . acted . with an intent to defraud investors,"
>
> c "[T]he evidence largely demonstrated that, at all [relevant] times , [Wood] believed that funds would be returned to investors and [the profits] would generate a massive windfall for . investors,"

d. "[T]he actions taken by Wood . were not consistent with an intent to defraud investors,"

e "Neither the existence of a conspiracy, nor a specific intent to defraud, can be imputed to Wood . on the actions of Van Etten [Fund III's founder], who orchestrated many of the Management Committee's decisions;"

f "There was no reasonable basis for the jury to conclude from the evidence that Wood did not intend to return investor funds,"

g. "[A]t all times Wood['s] . actions were consistent with attempts to ensure" Fund III's success,

h Because "the jury verdict . cannot be sustained . , [the] Motion[] [of Wood] for a Judgment of Acquittal will be granted on [all] counts," and

i "Because the evidence in this case weighs heavily against the verdict, . [and] should the judgment[] of acquittal be overturned, a new trial is conditionally warranted"

(Appendix at A-10 through A-26)

On July 20, 2007, and separate from the July 18th Order, Judge Boyle executed a "Judgment of Acquittal" in which he "acquitted" and "discharged" Wood on all remaining counts ("Judgment of Acquittal") (Appendix at A-27) (Emphasis Added). Unlike the July 18th Order, the Judgment of Acquittal did not address Wood's request for new trial

On August 17, 2007, the Government filed – but failed to execute – a "Notice of Appeal" which indicated that the Government was "appeal[ing] to the United States Court of Appeals for the Fourth Circuit from the **Judgment of Acquittal** as to Brent E. Wood in a criminal case, **entered in this action on the 20th day of July, 2007**." ("Original Notice of Appeal") (Emphasis Added) After filing its Original Notice of Appeal, and again on August 17, 2007, the Government filed an "Amended Notice of Appeal" using the exact language quoted above from the Original Notice of Appeal; however, the Government failed to execute the certificate of service of this second notice ("Amended Notice of Appeal") After filing its Amended Notice of Appeal, and on August 20, 2007, the Government filed another document entitled "Amended Notice of Appeal"

using the exact language quoted above from the Original Notice of Appeal Nevertheless, the Government did not file any notice of appeal from the July 18th Order, and specifically never filed any notice indicating intent to appeal Judge Boyle's order granting a new trial

After the Government's appeal was docketed with the Fourth Circuit but before the Government filed its docketing statement, Wood challenged the jurisdiction of the Fourth Circuit with a motion to dismiss the Government's appeal. Wood's motion to dismiss – which was based in part upon the Government's failure to appeal Judge Boyle's order granting a new trial - was denied without explanation (Appendix at A-9) Wood continued to challenge the jurisdiction of the Fourth Circuit in his response to the Government's Opening Brief filed with the Fourth Circuit, regardless, the Fourth Circuit's Decision did not specifically address this jurisdictional issue when it reversed and remanded Judge Boyle's ruling (Appendix at A-10 to A-26)

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit lacked jurisdiction to reverse the Trial Court's order granting a new trial since the Government never appealed that ruling.

Rule 3(c)(1)(b) of the Federal Rules of Appellate Procedure says that a "notice of appeal must . **designate the judgment, order, or part thereof being appealed**" (Emphasis Added) Rule 4 of the Federal Rules of Appellate Procedure establishes the time periods for filing notices of appeal This Court has confirmed that "Appellate Rules 3 and 4 . are indeed linked jurisdictional provisions" and that "Rule 3(c)(1) details what the notice of appeal must contain **The notice**, within Rule 4's timeframe, **must** (1) specify the party or parties taking the appeal; (2) **designate the judgment from which the appeal is taken**, and (3) name the court to which the appeal is taken" *Becker v. Montgomery*, 532 U.S at 765-766. (Emphasis Added) In other words, "[i]t is well established that the requirements of Rule 3 are jurisdictional" *Brooks v. Toyotomi Co, Ltd* , 86 F 3d 582, 586 (6th Cir 1996), *citing Torres v Oakland Scavenger Co.*, 487 U S at 316 While "a court may construe the Rules liberally in determining whether they have

been complied with, **it may not waive the jurisdictional requirements of Rules 3 and** 4, even for 'good cause shown' under Rule 2, if it finds that they have not been met." *Torres*, 487 U S at 317 (Emphasis Added) Despite the fact that this Court has said that "courts should construe Rule 3 liberally when determining whether it has been complied with, **noncompliance is fatal to an appeal.**" *Smith v Barry*, 502 U.S at 248. "[T]he general rule is that '[i]f an appellant chooses to designate specific determinations in his notice of appeal – rather than simply appealing from the entire judgment – only the specified issues may be raised on appeal" *U S. v Universal Mgmt. Servs , Inc.*, 191 F.3d 750, 756 (6th Cir. 1999), *quoting McLaurin v. Fischer*, 768 F 2d 98, 102 (6th Cir 1985), *cert denied*, 530 U S. 1274 (2000) In this case, the Government specifically designated its intent to appeal the acquittal judgment but did not designate an intent to appeal the order granting a new trial, hence, "only the specified issue [of acquittal should have been considered] on appeal" *Ibid*

Because the Government failed to designate its intent to appeal Judge Boyle's order granting a new trial to Wood, the Fourth Circuit lacked jurisdiction to consider – much less reverse – the new trial order. When the Fourth Circuit considered – and then reversed - Judge Boyle's new trial order, the Fourth

Circuit decided important federal questions in a way that conflicts with numerous relevant decisions of this Court For this reason, this Court should issue a writ of certiorari to review the judgment entered by the Fourth Circuit against Wood.

II. The Double Jeopardy Clause requires the dismissal of a government appeal of an acquittal on insufficiency of evidence after a jury returns a guilty verdict when the trial court has also granted a new trial and the government has failed to appeal the order granting the new trial.

Because the Government did not appeal Judge Boyle's order granting a new trial, and based upon the Fourth Circuit's reversal of the Judgment of Acquittal, remand for a new trial would naturally seem to be the appropriate next step, however, the Double Jeopardy Clause would be offended if a new trial proceeds In 1957, this Court confirmed that:

> [t]he underlying idea [of the Double Jeopardy Clause], one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State

> with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty
>
> *Green v United States*, 355 U S at 187-188

Based upon this "undelying idea," this Court has confirmed "that the Government cannot secure a new trial by means of an appeal even though [a fact finder's] acquittal may appear to be erroneous" *Ibid* at 188, *citing U S v Ball*, 163 U S. 662, 16 S Ct. 1192, 41 L.Ed 300 (1896), *Peters v Hobby*, 349 U S 331, 344-345, 75 S.Ct 790, 796, 99 L Ed 1129 (1955), *Cf. Kepner v U S.*, 195 U S 100, 24 S.Ct. 797, 49 L Ed 114 (1904), *U S v Sanges*, 144 U S 310, 12 S.Ct 609, 36 L Ed 445 (1892) On the other hand, with statutory permission, the Government can appeal a trial judge's acquittal after entry of a guilty verdict by a jury without offending the Double Jeopardy Clause since

this Court has determined that "reversal on appeal would merely reinstate the jury's verdict" and thereby "not offend the policy of multiple prosecution" under the Double Jeopardy Clause *United States v Wilson*, 420 U S at 344-345 In this case, however, the prohibition of multiple prosecutions will be offended since the Government – despite vast "resources and power" – failed to appeal Judge Boyle's new trial order thereby dictating remand for a second trial rather than remand for sentencing only

"At the heart of this [prohibition of multiple trials] is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression" *U S. v Martin Linen Supply Company*, 430 U S at 569 (1977) In other words, "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding" *Burks v. U.S.*, 437 U.S. at 11 Thus, the Double Jeopardy Clause does not prohibit retrials following a dismissal based upon "judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct," however, "[t]he same cannot be said when a

defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble." *Ibid* at 15-16. Furthermore, "it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy." *Ibid* at 17. In summary, this Court has confirmed that "the Double Jeoparty Clause precludes a second trial when the reviewing court has found the evidence legally insufficient." *Ibid* at 18 This principle is critical in this case since Judge Boyle "found the evidence legally insufficient" as to Wood *Ibid.*

Moreover, the fact that Judge Boyle - rather than the appellate court – "found the evidence legally insufficient" does not alter the Double Jeopardy impact under the unique circumstances of this case. *Hudson v Louisiana, supra* In *Hudson*, the "Petitioner . was tried in Louisiana state court for first-degree murder and the jury found him guilty." *Ibid* at 41 Hudson "then moved for a new trial, which under Louisiana law was [his] only means of challenging the sufficiency of the evidence against him." *Ibid* "The trial judge granted the motion" based upon his conclusion that insufficient evidence supported the verdict *Ibid* As a result, Hudson was tried a second time, and the second jury also found him guilty

Ibid at 42. Upon Hudson's writ of habeas corpus, this Court confirmed that "the Double Jeopardy Clause barred the State from prosecuting [Hudson] a second time" since "[t]he trial judge granted a new trial because the State had failed to prove its case as a matter of law" *Ibid* at 44-45 Like in Hudson, the Fourth Circuit determined "that [Judge Bolye] granted a new trial based on [his] finding that the evidence was insufficent to support the verdict" In summary, and because (a) Judge Boyle determined that the Government failed to prove its case as a matter of law, (b) the Government did not appeal Judge Boyle's order granting a new trial, and (c) reversal of the Judgment of Acquittal results in a new trial, the Double Jeopardy Clause bars any retrial of Wood

Again, this Court has confirmed that "[a] verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial" *Tibbs v Florida*, 457 U S at 41. And that shield is not destroyed by a "successful postacquittal appeal by the prosecution" *Smalis v Pennsylvania*, 476 U S 140 at 145 "[W]hether the trial is to a jury or to the bench, subjecting [a] defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause" *Ibid, citing Arizona v. Rumsey*, 467 U.S at 211-212 Furthermore, "[w]hen a

successful postacquittal appeal by the prosecution would lead to proceedings that violate the Double Jeopardy Clause, the appeal itself has no proper purpose" *Ibid*, *See also, Smith v Massachusetts*, 543 U S at 467 Since the Government's successful postacquittal appeal in this case will lead to a new trial, the appeal should have been dismissed by the Fourth Circuit Because the Fourth Circuit failed to dismiss the Government's appeal, and because that failure to dismiss the appeal conflicts with numerous relevant Supreme Court decisions, this Court should issue a writ of certiorari to review the judgment entered by the Fourth Circuit against Wood.

III. In the very least, the Fourth Circuit should have remanded the case back to the Trial Court so that the Trial Court could clarify its Order.

Finally, this Court should issue a writ of certiorari to address the proper remedy when a trial court has failed to adequately explain its basis for granting a new trial

After determining that the Judgment of Acquittal should be reversed, the Fourth Circuit made the following comment about Judge Boyle's order granting a new trial

> Here, the district court failed to explain its decision to grant a new trial, stating only that "the evidence in this case weighs heavily against the verdict." It appears that the court granted a new trial based on its finding that the evidence was insufficient to support the verdict Because we have concluded that the evidence was sufficient, we must find the grant of a new trial an abuse of discretion
>
> (Appendix at A-6).

In other words, and rather than remanding with instructions to Judge Boyle to clarify his basis for granting the new trial, the Fourth Circuit punished Wood for Judge Boyle's "fail[ure] to explain [his] decision" *Ibid* In addition, the Fourth Circuit's failure to remand with instructions to Judge Boyle to clarify his basis for granting a new trial conflicts with numerous relevant Supreme Court decisions

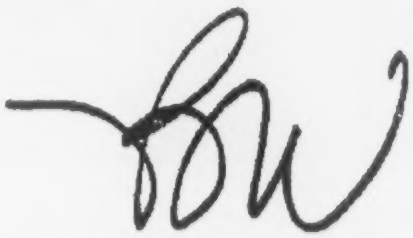
If an appellate court believes that the trial court has failed to explain the basis for its decision – especially when that decision impacts a person's liberty and pursuit of happiness – the appellate court should remand

the matter for clarification rather than simply reversing the ruling they cannot understand For example, in evidentiary matters, this Court has said when there is an "unclear basis [for a] District Court decision, the Court of Appeals should . remand[] the case to the District Court for clarification" *Sprint/United Management Co v Mendelsohn*, 552 U S. at __. Similarly, when presented with a writ of certiorari challenging a writ of prohibition denied by the Supreme Court of Pennsylvania without opinion, this Court remanded the matter back to the Supreme Court of Pennsylvania "to clarify the record." *Capital Cities Media, Inc v Toole*, 466 U S at 378, *See also Philadelphia Newspapers, Inc v. Jerome, supra* In response to Wood's writ of certiorari, and in the very least, this Court should remand the matter back to the Fourth Circuit with instruction to remand the matter back to Judge Boyle "to clarify the record." *Ibid* In conclusion, the Fourth Circuit's failure to remand the matter back to Judge Boyle "to clarify the record" caused the Decision to so far depart from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power through a writ of certiorari *Ibid*

CONCLUSION

For these reasons, Wood asks that this Honorable Court grant his writ of certiorari and review the judgment of the Fourth Circuit

Respectfully submitted this the 25th day of December, 2009.



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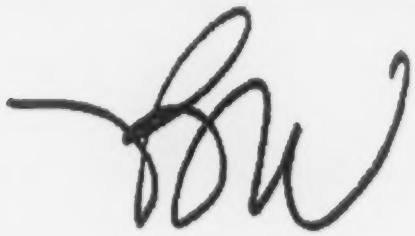
CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that a true and correct copy of the foregoing ***Petition for Writ of Certiorari*** was served on the parties in this action by placing said copy in the United States Mail, postage prepaid and addressed as follows

Anne M Hayes, Esq
Office of the U.S. Attorney
Terry Sanford Federal Building
310 New Bern Avenue, Suite 800
Raleigh, North Carolina 27601

This the 25th day of December, 2009



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BRENT E. WOOD,
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APPENDIX

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FILED: September 28, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-4814
(5:05-cr-0044-BO)

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

BRENT EARL WOOD,

Defendant - Appellee

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc..

Entered at the direction of the panel: Judge Wilkinson, Judge Motz, and Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-4814

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

BRENT EARL WOOD,

Defendant - Appellee

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern. Terrence W. Boyle, District Judge (5:05-cr-00044-BO)

Submitted. July 9, 2009 Decided August 14, 2009

Before WILKINSON, MOTZ, and SHEDD, Circuit Judges.

Reversed and remanded by unpublished per curiam opinion.

George Edward Bell Holding, United States Attorney, Ann Margaret Hayes, Assistant United States Attorney, Raleigh, North Carolina, for Appellant Brent Earl Wood, Cary, North Carolina, for Appellee

Unpublished opinions are not binding precedent in this circuit

PER CURIAM

The United States appeals from a judgment of acquittal and conditional new trial granted to Brent E. Wood after a jury convicted him of eight charges relating to fraudulent misrepresentations made to investors in a venture capital fund. The district court found that, despite the jury's verdict, the Government's evidence was insufficient as a matter of law to sustain Wood's convictions. The district court granted Wood a judgment of acquittal and, in the event of a reversal of this judgment, a new trial For the following reasons, we reverse the district court's order, and remand for sentencing.

Federal Rule of Criminal Procedure 29 provides that a district court "must enter a judgment of acquittal [when] the evidence is

insufficient to sustain a conviction" Fed R Crim P 29(a). We review a judgment of acquittal de novo, determining whether, viewing the evidence in the light most favorable to the Government, a rational fact-finder could have found the essential elements of the charged offenses beyond a reasonable doubt See United States v Singh, 518 F.3d 236, 246 (4th Cir 2008)

The elements of substantive mail fraud are (1) the existence of a scheme to defraud, and (2) the use of mails to perpetrate the scheme United States v. Vinyard, 266 F 3d 320, 326 (4th Cir. 2001) To establish the first element, the Government must prove that Wood "acted with the specific intent to defraud, which 'may be inferred from the totality of the circumstances and need not be proven by direct evidence.'" United States v. Godwin, 272 F.3d 659, 666 (4th Cir. 2001) (quoting United States v. Ham, 998 F.2d 1247, 1254 (4th Cir 1993)).

To prove a conspiracy to commit mail fraud, the Government must prove (1) the existence of an agreement to commit mail fraud, (2) the defendant's willing participation, and (3) an overt act in furtherance of the agreement United States v Edwards, 188 F.3d 230, 234 (4th Cir 1999) The Government must show that the defendant acted with a specific intent to defraud, which may be proven with

circumstantial evidence United States v Burgos, 94 F 3d 849, 858 (4th Cir 1996) (en banc)

To establish a conspiracy to commit money laundering, the Government must prove (1) the existence of an agreement to commit money laundering, (2) the defendant knew the money laundering proceeds were derived from illegal activity, and (3) the defendant knowingly and voluntarily participated in the conspiracy Singh, 518 F 3d at 248

Viewing the evidence in the light most favorable to the Government, we find that the Government presented evidence more than sufficient for a rational juror to conclude that Wood acted with specific intent to defraud investors and launder money The district court therefore erred in granting a judgment of acquittal.

The Government also argues that the district court erred in conditionally granting Wood a new trial We review a district court's grant of a new trial for an abuse of discretion United States v Wilson, 118 F 3d 228, 237 (4th Cir. 1997) The district court should exercise its discretion to award a new trial "sparingly," and should only grant a new trial when the evidence weighs so heavily against the verdict that to deny a new trial would be contrary to

the "interest of justice." Fed. R. Crim. P. 33; see United States v. Smith, 451 F.3d 209, 216-17 (4th Cir. 2006); United States v. Campbell, 977 F.2d 854, 860 (4th Cir. 1992). In deciding a motion for a new trial, the district court may consider the credibility of witnesses and is not required to view the evidence in the light most favorable to the government. Campbell, 977 F.2d at 860.

Here, the district court failed to explain its decision to grant a new trial, stating only that "the evidence in this case weighs heavily against the verdict." It appears that the court granted a new trial based on its finding that the evidence was insufficient to support the verdict. Because we have concluded that the evidence was sufficient, we must find the grant of a new trial an abuse of discretion.

For the foregoing reasons, we reverse the district court's judgment of acquittal and its conditional grant of a new trial. We deny Wood's motions to amend the informal brief and for oral argument, and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. We remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED

FILED August 14, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No 07-4814
(5 05-cr-0044-BO)

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v

BRENT EARL WOOD,

Defendant - Appellee

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is reversed. This case is remanded to the District Court for further proceedings consistent with the Court's decision

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed R App P 41

/s/ PATRICIA S. CONNOR, CLERK

FILED December 26, 2007

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No 07-4814 (L)
(5:05-cr-0044-BO)

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v

BRENT EARL WOOD,

Defendant - Appellee

ORDER

Appellee Pace has filed a motion to join appellee Wood's motion to dismiss

The Court grants appellee Pace's motion to join Wood's motion to dismiss

The Court denied appellees motion to dismiss

For the Court – By Direction

/s/ Patricia S. Conner, Clerk

FILED July 18, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
v	)	ORDER
DIANE W PACE and BRENT E WOOD,	)	

Defendants

This case is before the Court on Defendants' Motions for a Judgment of Acquittal, or Alternatively, a New Trial For the reasons discussed below, Defendants' Motions are GRANTED

BACKGROUND

On February 18, 2005, Defendants Brent Wood ("Wood") and Diane Pace ("Pace") were indicted on nine counts, including Conspiracy to Commit Mail Fraud and Wire Fraud in violation of 18 U.S C § 371, six counts of Mail

Fraud in violation of 18 U S C. § 1341 and 1342, Wire Fraud in violation of 18 U S C §§ 1343 and 1342, and Conspiracy to Commit Money Laundering in violation of 18 U.S.C § 1956(h) A superseding indictment was issued on March 17, 2005 The underlying charges related to Defendants' involvement in an allegedly illegal investment scheme, as two of the five members[1] of the Management Committee for Mayflower Venture Capital Fund III ("Fund III") Wood, an attorney, assisted the fund by drafting legal documents and occasionally communicating with investors Pace, who had a securities background, assisted in administrative matters and communicated with investors The managers' decisions were largely coordinated and directed by Fund III founder Stanley Van Etten ("Van Etten"), who was not a member of the Committee [2] In the indictment, the Government alleged that Wood and Pace defrauded numerous investors, by making false representations that monies invested in Fund III would be used exclusively

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[1] The other members of the Management Committee were Tom Eilers, John Brothers, and Scott Pollock All three testified for the Government at trial

[2] Van Etten pled guilty to Count One of the superseding indictment, and to charges in a separate indictment, on April 29, 2005 In exchange for his plea the Government dismissed charges 2 through 9 of the superseding indictment against him in this case

for investment in the Initial Public Offering ("IPO") of BuildNet BuildNet was a local internet start-up that sought to offer online services to the construction community

Defendants' joint trial began on May 1, 2006 in Raleigh, North Carolina At trial, the Government presented evidence that in March of 2000, Fund III began to actively seek loans from investors, ultimately totaling approximately $15 million. As evidence of the loan, the lenders received promissory notes, which included guaranteed repayment of their principal plus 12% interest in the event that the BuildNet IPO did not happen

The Government argued at trial that Defendants and other Management Committee members fraudulently communicated to investors that funds would be used solely for Buildnet, while having previously agreed among themselves to invest the funds in other companies In response, during trial Defendants repeatedly referred to documents provided to investors as evidence that there was no guarantee made to investors that funds would be set aside exclusively for Buildnet.

In support of the conspiracy and fraud charges, the Government presented several emails and memoranda authored by Management Committee members. On March

29, 2000, a memorandum, authored by Van Etten and Pace, was distributed to investors, actively soliciting funds for Fund III. The memorandum informed investors that the Fund would "'borrow' funds from investors, "with the primary purpose of using those funds to purchase IPO shares." Investors were informed that any funds not used to purchase Buildnet IPO shares would be returned to investors

On March 30, 2000, one day later, Van Etten distributed a memo to all Management Committee members. In contrast to the memo sent to investors the day before, the memo circulated to the Management Committee seemed to indicate that some of the loan funds would be used for other companies, and that any funds used for these so-called "portfolio companies" would be replaced when a final Offering Circular for Fund III was completed [3]

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[3] The memo's description of Fund III reads

All the money currently deposited into Fund III is a loan These funds will be used to manage the short-term cash flow obligations and commitments made by Fund III to companies, as well as to pay all BuildNet IPO shares that are allocated to the Fund These investments will be kept separate and any money not invested in BuildNet will be returned to the investor under the terms and conditions of the Promissory Note Any funds used between now and then, and [sic] will be replaced by money raised once the Offering Circular and Term Sheet have been completed for Fund III There is more than

The Government argued at trial that the disparity evident in these memos is evidence of the Management Committee's fraudulent scheme

The Government also presented evidence that investor funds were used for purposes other than BuildNet almost as soon as funds were received, and immediately after the first memo was sent to investors On March 31, 2000, two days after the memo was sent to investors, Fund III disbursed $100,000 to a company named One World Online By the end of April, Fund III had raised over $12 million in "loans," nearly $4 million of which had been invested in companies other than BuildNet These included Big Sky Beef LLC, FileFrenzy com, Inc , and Success Companies LLC

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enough time to manage these cashflow issue and replace these monies without risk, we have 60 days to return loaned monies to the Fund for the purpose of the BuildNet IPO effective date Remember, the investors are only loaning money to Fund III Their money will be used to buy BuildNet IPO shares in the Fund's name and any money not used, will be returned Also there will be no dilution of the BuildNet investment by investments made by Fund III in other portfolio companies Those transactions will be kept separate and apart

In late May of 2000, Defendants submitted an Offering Circular to investors [4] The Circular was largely drafted by Wood. Its terms gave investors until June 15, 2000 to convert their promissory notes into "Preferred Units," which would guarantee participation in the BuildNet IPO. Investors that did not convert would retain their rights under the promissory note, but would not be able to participate in the BuildNet IPO. As part of the Offering Circular, Fund III also solicited an additional $35 million that would be designated as "Common Units " Investors were specifically informed that Common Units funds would be invested in companies other than BuildNet [5]

Unlike the language of the March update memorandum, the Offering Circular indicated

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[4] On May 12, 2000 prior to sending investors the Offering Circular, the Management Committee circulated a Term Sheet to investors The Term Sheet informed investors that the $15 million in Preferred Units would be "reserved for investment in the BuildNet IPO "

[5] At the same time that the Management Committee was soliciting further funds for investment in Common Units, the stock market's enthusiasm for Internet companies was beginning its dramatic decline Fund III was ultimately unable to garner investor support for the Common Units Ultimately the fund only raised $17 million of its $50 million goal

that the Management Committee would have some discretion in the investment of funds The "Use of Funds" section noted that funds "will be available for funding the Venture Capital Fund's investment in Portfolio Companies and other general operations" In addition to BuildNet, the Offering Circular identified several other prospective companies in which to invest However, the Circular indicated that such investments would only be made on behalf of Common Unit holders

A large majority of the promissory note holders opted to convert their investment into Preferred Units by the June 15th deadline. However, the BuildNet IPO was delayed due to flagging IPO markets. Therefore, in August of 2000, the Management Committee sought to entice Fund III Preferred Unit investors to convert to Common Units The Government argued at trial that this action was taken in order to avoid the obligation under the original note to refund money to investors, and to hide the Management Committee's fraudulent investments in portfolio companies.

The Buildnet IPO registration was withdrawn on October 24, 2000. This event triggered a provision for the return of investor funds within 60 days. At the end of the 60-day period, the Management Committee was unable to return funds to investors, because the

funds had already been disbursed to other portfolio companies On December 19, 2000, the Management Committee sent a letter to investors indicating that the loaned monies could not be repaid due to poor market conditions

At trial, the jury heard testimony from several witnesses that invested in Fund III, and from investigators involved in the detection of financial fraud The investors called by the Government universally testified that they understood that their funds invested would be set aside for investment in the BuildNet IPO Wood and Pace each testified at trial, and independently explained to the jury that they did not intend to defraud investors Defendants also argued that Fund III investors were primarily sophisticated, high net-worth individuals that should have known that funds would be used elsewhere, based on the documents provided to them and the high rate of interest contained in the promissory note.

On May 11, 2006, the jury found both Defendants guilty of the conspiracy and mail fraud counts, but not guilty of wire fraud On May 17, 2006, both Defendants filed separate Motions for Judgment of Acquittal, or alternatively for a New Trial, pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure The Government responded on June

2, 2006. The Motions were held in abeyance while trial transcripts were completed and filed A hearing on the Motions was held in Raleigh, North Carolina, on April 10, 2007

ANALYSIS

Defendants have both moved for judgments of acquittal, or alternatively for a new trial Where a motion for judgment of acquittal challenges the sufficiency of the evidence, the conviction must be sustained if the evidence is sufficient for any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *United States v. Romer*, 148 F 3d 359, 364 (4th Cir 1998). The Court must view "the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the Government" *United States v Burgos*, 94 F.3d 849, 863 (4th Cir 1996)

"The decision to grant or deny a motion for new trial is within the broad discretion of the district court" *United States v. Tucker*, 376 F.3d 236,238 (4th Cir. 2004) Under Rule 33, a district court may grant a new trial "if required in the interests of justice." *United States v Arrington*, 757 F 2d 1484, 1485 (4th Cir 1985) However, the remedy of a new trial should be used sparingly, and only when the evidence weighs heavily against the verdict *United*

States v. Perry, 335 F 3d 316, 320 (4th Cir 2003)

To convict a defendant of conspiracy to commit mail fraud, the Government must prove three things beyond a reasonable doubt· (1) the existence of an agreement to commit mail fraud; (2) an overt act by one of the defendants in furtherance of the agreement, and (3) knowing participation *United States v. Edwards*, 188 F 2d 230,234 (4th Cir 1990). In order to prove mail fraud, the Government must demonsirate a defendant's (I) knowing participation in a scheme to defraud, and (2) a mailing in furtherance of the scheme *United States v Dozie*, 27 F 3d 95, 97 (4th Cir 1994). To prove conspiracy to commit money laundering, the Government need not prove commission of the underlying offense[6] *United States v Allere*, 430 F 3d 681, 694 (4th Cir 2005). However, the Government must show that the "defendant was involved with two or more people to launder money and that the

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[6] Money laundering requires a showing of (1) knowledge that the property involved in a financial transaction represents the proceeds of unlawful activity, (2) conducting or attempting to conduct a transaction with such property, (3) with the intent to continue the unlawful activity, and (4) with knowledge that the transaction is designed to conceal the nature, location, source, ownership or control of the proceeds of the unlawful activity 18 U S C § 1956

defendant knew the proceeds used to further the scheme were derived from illegal activity." *Id.*

Specific intent is a key element of the conspiracy and mail fraud offenses. "To convict on mail fraud conspiracy, the jury must find that a defendant acted with specific intent to defraud." *United States v. Ham*, 998 F.2d 1247 (4th Cir. 1993). The same is true of the substantive mail fraud offense. *United States v. Godwin*, 272 F.3d 659, 666 (4th Cir. 2001). As such, good faith is an absolute defense to a charge of mail fraud. *United States v. Martin-Trigona*, 684 F.2d 485, 492 (7th Cir. 1982).

In this case, a rational trier of fact could not review the evidence and conclude that either Wood or Pace acted with a specific intent to defraud investors or to launder money. February 2000 to June 2001 constitutes the time frame for the charged offenses.[7] It was then, according to the indictment, that

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[7] Count One charges a conspiracy to commit mail and wire fraud beginning in or about February 2000, and continuing through June 2001. Counts Two through Seven allege a scheme to defraud beginning in February 2000 and continuing until May 2001. The first charged use of the mails, an investor update letter, was sent on May 3, 2000, the last was mailed on November 20, 2000. Count Nine charges conspiracy to commit money laundering beginning on or about March 2000, and continuing through March 2001.

Defendants conspired to commit mail fraud, wire fraud, and money laundering, and sent mailings constituting the substantive mail fraud offenses. However, no evidence was adduced at trial from which a jury could reasonably conclude that either Wood or Pace acted during that period with an intent to defraud investors. On the contrary, the evidence largely demonstrated that, at all times prior to withdrawal of the BuildNet IPO, the managers of Fund III believed that funds would be returned to investors either through payment of the promissory note or through investment in BuildNet, and further that the IPO would generate a massive windfall for Fund III and its investors

In March of 2000, the Management Committee of Fund III began to solicit investor funds, in the form of a loan The memorandum sent to investors by Van Etten and Pace indicated that funds would be used primarily for investment in the BuildNet IPO Lenders were given a promissory note in return; the note itself did not place restrictions on use of the funds. Confidence in the IPO was high enough that lenders were guaranteed a 12% rate of return on loaned funds According to the testimony of several witnesses, at that time, all involved in Fund III thought that the IPO of BuildNet was imminent.

During April of 2000, lenders wired money to Fund III at a rapid rate by the end of the month, the fund had raised $12 5 million. At the same time, the Management Committee was investing funds in other companies, and making loans to certain individuals By the end of April, $3 9 million had been spent by the Management Committee.

In May, Wood and other members of the Management Committee prepared an Offering Circular for distribution to investors. The Management Committee opted to seek an additional $35 million in funds via the offering, in the form of Common Unit investments The Common Unit portion of the offering proved unsuccessful, in contrast to the original solicitation of lender funds Ultimately, a majority of promissory note investors opted to convert their promissory notes into Preferred Units by the June 15th deadline contained in the Circular. Some investors that did not want to convert were returned their monies

There is no question that several documents sent to investors were not fully forthcoming concerning the contemplated use of investor funds. However, the actions taken by Wood and Pace were not consistent with an intent to defraud investors. Fund III managers had arrangements with several investment banks that would allow the fund to receive an

allocation of BuildNet IPO shares. Van Etten and various cohorts had raised large amounts of money in Fund I and Fund II Investors from Funds I and II, most of whom were high-net worth individuals were given the opportunity to invest in Fund III Enthusiasm for the BuildNet IPO had been building since a Wall Street Journal article was published about the company Again, every investor and Management Committee member to testify recounted that at the time they believed that an IPO could go forward at any time

Neither the existence of a conspiracy, nor a specific intent to defraud, can be imputed to Wood and Pace based on the actions of Van Etten, who orchestrated many of the Management Committee's decisions. On March 30,2000, Van Etten sent a memorandum to the Management Committee, including Wood and Pace, assuring them that Fund III monies used to finance other investments could be replaced "without risk" During trial, Management Committee members called by the Government recounted their belief that Fund III monies used for other investments could be replaced prior to the BuildNet IPO. Other Committee members testified that at the time, they believed that the BuildNet IPO would make all of them very wealthy There was no reasonable basis for the jury to conclude from this evidence that Wood and Pace did not intend to return

investor funds, either through repayment of the borrowed funds or investment in the BuildNet IPO. Moreover, regardless of Van Etten's true intentions, at all times Wood and Pace's actions were consistent with attempts to ensure Fund III's successful participation in the BuildNet IPO. Accordingly, the jury's verdict on Counts One through Seven and Count Nine of the indictment cannot be sustained. Defendants' Motions for a Judgment of Acquittal will be GRANTED on those counts

Additionally, the Court notes that there was a paucity of evidence linking Pace to any scheme to defraud or to launder funds Pace had extremely limited involvement with investors The Government produced testimony from only one investor that spoke directly with Pace Immediately after the fund was initiated, all members of the Management Committee were informed by Van Etten that Pace would "assist in the management of Fund III from an administrative perspective, only" The evidence showed that Pace's subsequent actions conformed with Van Etten's instruction Pace processed investor questionnaires, and helped transact payments to portfolio companies. While Pace was the recipient of several of the emails shown to the jury, there was very little evidence of her active involvement in management decisions of the fund Evidence presented at trial concerning

Pace was far too scant for a jury to conclude beyond a reasonable doubt that Pace had committed any of the crimes charged

CONCLUSION

For the reasons discussed above, Defendant's Motion for Judgment of Acquittal and Motion for New Trial are GRANTED Pursuant to Rule 29(d) of the Federal Rules of Criminal Procedure, the Court must also conditionally determine whether any motion for a new trial should be granted in the event that the judgments of acquittal are later vacated or reversed Because the evidence in this case weighs heavily against the verdict, the Court has determined that, should the judgments of acquittal be overturned, a new trial is conditionally warranted [8]

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[8] Because Defendants prevail on their Motions for a Judgment of Acquittal, or Alternatively, a New Trial, their remaining Motions - to compel disclosure, to depose Van Etten, and to provide additional evidence -will each be DISMISSED as MOOT

SO ORDERED

This 15 day of July, 2007.

/s/ Terrence W. Boyle
TERRENCE W BOYLE
UNITED STATES DISTRICT
JUDGE

FILED: July 20, 2007

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,	)	JUDGMENT OF ACQUITTAL
v	)	
BRENT E WOOD,	)	CASE NO 5 05-CR-44-2-BO

The Defendant was found not guilty. IT IS ORDERED that the Defendant is acquitted, discharged, and any bond exonerated in the offense charged in

On Ct's 1 th 7 and 9 of the Superseding Indictment.

/s/ Terrence W. Boyle
Signature of Judicial Official

TERRENCE W BOYLE, U S District Judge

7/18/2007
Date